

Michigan Law Review

Volume 97 | Issue 6

1999

The Foundations of Liberty

Lawrence B. Solum

Loyola Law School, Loyola Marymount University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Law and Society Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Lawrence B. Solum, *The Foundations of Liberty*, 97 MICH. L. REV. 1780 (1999).

Available at: <https://repository.law.umich.edu/mlr/vol97/iss6/26>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE FOUNDATIONS OF LIBERTY

Lawrence B. Solum*

THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW.
By Randy E. Barnett. Oxford: Clarendon Press. 1998. Pp. xi, 347.
\$29.95.

INTRODUCTION

Randy Barnett's *The Structure of Liberty*¹ is an ambitious book. The task that Barnett sets himself is to offer an original and persuasive argument for a libertarian political theory, a theory that challenges the legitimacy of the central institutions of the modern regulatory-welfare state. *The Structure of Liberty* is that rare creature, a book that delivers on most of the promises it makes. Already the book is on its way to becoming a contemporary classic, the successor in interest to Robert Nozick's *Anarchy, State and Utopia* as a source of ideas and arguments for the revitalization of an important intellectual tradition that has long stood at the periphery of legal and political theory. No one will be surprised that Barnett's argument rests on a controversial and contested vision of human interaction. What may come as a shock is the power of this vision to provoke a thoughtful response from readers with ideological and political commitments that are poles apart from those articulated in *The Structure of Liberty*.

One of the great virtues of *The Structure of Liberty*² is that it is written with an unusual clarity of expression. *Structure* avoids a central vice of much contemporary political philosophy: the book is filled with concrete examples and specific public policy proposals. At the same time, *Structure* embraces the central virtue of modern political theory; the argument is carefully articulated so as to lay bare the bones of the ideas and expose them to careful scrutiny. Barnett has written a readable book that nonetheless will repay careful study.

Despite *Structure*'s many strengths, the book is not without its flaws. Chief of these is the book's avoidance of fundamental questions about the nature of political justification. Barnett attempts to

* Professor of Law and William M. Rains Fellow, Loyola Law School, Loyola Marymount University. B.A. 1981, University of California at Los Angeles; J.D. 1984, Harvard. — Ed.

1. Randy Barnett is the Austin B. Fletcher Professor of Law at Boston University School of Law.

2. Hereinafter *STRUCTURE*.

craft an argument that eschews reliance on any particular framework for political and moral theory. The result, however, is a work that neither embraces deep foundations nor provides a compelling explanation for their absence. For this reason, the full implications of *Structure* are cloudy, and a final assessment of its merits requires an excavation of its foundations — an effort that is begun but hardly completed in this review.

What is certain is that *Structure* provides a rich and provocative set of arguments that will stimulate strong reactions from both the friends and foes of its intriguing mix of classical liberalism, libertarianism, and anarchism. *Structure* is filled with radical proposals, ranging from the abolition of criminal punishment to the suggestion that private adjudication and law enforcement services could replace the state entirely. Barnett defends these suggestions with common-sense ideas that are assembled into a powerful theoretical framework. Even if *Structure* does not convert the heathen, it will surely change the topic of many conversations about the proper function of law.

I. THE STRUCTURE OF *STRUCTURE*

The central argument of *Structure* aims to justify a set of ideas about fair social organization. Barnett calls these ideas “the liberal conception of justice” (p. 63). The argument for the liberal conception focuses on three central problems of human interaction: the problem of knowledge, the problem of interest, and the problem of power. Barnett argues that given “the goal of enabling persons to survive and pursue happiness, peace, and prosperity while living in society with others” (p. 23), these fundamental problems of human interaction create constraints on the possible forms of social organization. Unless society is organized to respect rights of several property, freedom of contract, restitution, and self-defense, the problems of knowledge, interest, and power will make it impossible for all persons (or each and every person) to survive and pursue happiness, peace, and prosperity. Barnett’s liberal conception of justice is simply a detailed formulation of the content of the rights that must be respected.³ Near the conclusion of *Structure*, Barnett imagines a society that respects these rights to the hilt, a polycentric

3. The liberal conception of justice is given eight formulations at various points in *The Structure of Liberty*, each formulation adding content to the conception as the problems of knowledge, interest, and power are developed. The last formulation gives the fullest sense of Barnett’s views and it is quoted here in full:

Formulation 8. **Justice is respect for the rights of individuals and associations.**

(1) The *right of several property* specifies a right to acquire, possess, use, and dispose of scarce physical resources — including their own bodies. Resources may be used in any way that does not physically interfere with other persons’ use and enjoyment of their resources. While most property rights are freely alienable, the right to one’s person is inalienable.

constitutional order in which the state has withered and been replaced by private associations which provide what economists have traditionally called "public goods," such as police protection and dispute resolution.

A. Foundations

If the central argument of *Structure* is the justification of the liberal conception of justice based on the problems of knowledge, interest, and power, the first chapter is Barnett's attempt to build the philosophical foundation upon which this justification rests. This chapter is perhaps the least satisfying in the book, and the issues that it raises will be examined later in this review. The central organizing idea is the notion of a natural right. Borrowing terminology from Philippa Foot,⁴ Barnett argues that natural rights

-
- (2) The *right of first possession* specifies that property rights to unowned resources are acquired by being the first to establish control over them and to stake their claim[.]
 - (3) The *right of freedom of contract* specifies that a rightholder's consent is both necessary (freedom from contract) and sufficient (freedom to contract) to transfer alienable property rights — both during one's life and, by using a "will," upon one's death. A manifestation of assent is ordinarily necessary unless one party somehow has access to the other's subjective intent.
 - (4) Violating these rights by *force or fraud* is unjust.
 - (5) The *right of restitution* requires that one who violates the rights that define justice must compensate the victim of the rights violation for the harm caused by the injustice, and such compensation may be collected by force, if necessary. The *principle of strict proportionality* limits the amount of restitution to that which is necessary to fully compensate, but not overcompensate, the victim.
 - (6) The *right of self-defense* permits the use of force against those who threaten to violate the rights of another. Normal self-defense is permissible when the commission of a rights violation is imminent. Extended self-defense is permissible when a person has communicated, by prior rights violations or some other prior conduct proven to a high degree of certainty, a threat to violate rights in the future. Self-defense should be proportionate to the risk posed by the threat.

P. 214.

4. One difficulty that philosophically-trained readers may have with *Structure* is Barnett's tendency to adapt terminology and theories to his own purposes, even when the ideas that he borrows had quite different meanings and functions in their original context. Thus, Philippa Foot's use of the phrase "hypothetical imperative" is located in her work in metaethics, but Barnett does not discuss metaethical issues when he invokes her work. Compare Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 *PHIL. REV.* 305 (1972), with pp. 17-18.

A similar difficulty exists with respect to Barnett's use of H.L.A. Hart's notion of the minimum content of the natural law. Hart introduces this notion to show that the constraints on the nature of law imposed by the human condition are very weak indeed, whereas Barnett invokes Hart's notion in support of what, at first blush, might seem to be the opposite conclusion, i.e., that fundamental problems of human nature impose very strong constraints on the content of the law. This seeming opposition is dissolved once we appreciate that Hart introduced his idea to show that nature imposes very weak constraints on the concept of law, that is, on what can count as a "law," from the point of view of philosophical analysis. See H.L.A. HART, *THE CONCEPT OF LAW* 188-89 (1961). Barnett uses Hart's terminology for the very different purpose of showing that nature imposes very strong constraints on what laws can be justified. P. 11. Barnett would not claim that his argument establishes that compliance with his liberal conception of justice is required for a norm to count as a law.

It would be unfortunate if criticism of *Structure* were to focus on Barnett's lamentable tendency to credit others with ideas that are actually his own. Although Barnett's adaptation

are justified by a "hypothetical imperative" (p. 17). As laid out by Barnett, the hypothetical imperative includes both a normative and a factual predicate. The normative predicate is the goal of providing each individual with the opportunity to pursue happiness, peace, and prosperity. The factual predicate is provided by Barnett's development of the problems of knowledge, interest, and power. The conclusion or imperative is the set of rights that Barnett specifies in his liberal conception of justice, e.g., several property, freedom of contract, restitution, and self-defense.

Asking the following question can draw out an important ambiguity in *Structure's* foundation: to whom is the hypothetical imperative addressed? One possible answer is that *Structure* is addressed to the interest of each and every actual individual in peace, prosperity, and happiness. If this is the case, then the argument of *Structure* must meet an extraordinarily high burden. Surely there are some individuals who are advantaged by legal regimes that restrict property and contract rights: one example might be highly placed members of the *nomenclatura* in the former Soviet Union. Another possibility is that the argument of *Structure* is addressed to hypothetical individuals behind a Rawlsian veil of ignorance⁵ as to their present circumstances. If Barnett intends his argument to rest on this sort of contractarian premise, then *Structure* fails to acknowledge the many criticisms that have been leveled at this form of political justification. Yet another possibility is that the hypothetical imperative is addressed to society as a whole. For example, it might be the case that the argument of *Structure* is based on a utilitarian principle of the greatest "happiness, peace, and prosperity" for the greatest number. If *Structure* rests on this sort of consequentialism, then Barnett owes us an explanation for *Structure's* failure to deal with the many objections to consequentialism raised by moral and political philosophers. These foundational questions are important, and they will be taken up again, after this brief overview of the structure of *Structure* has been completed.

B. *The Method of Structure*

After the first chapter, most of *Structure* is devoted to the development of the thesis that the liberal conception of justice is the best solution to the problems of knowledge (chapters 2-6), interest (chapters 7-9), and power (chapters 10-14). A preliminary word about the method of *Structure* may help to clarify the nature of Barnett's claims and his arguments for them. The central claims of *Structure* are empirical. Barnett argues for the existence of the

of the terminology and ideas of others to suit his own purposes introduces some confusion in his exposition, this is, at bottom, a problem of style and not of substance.

5. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

problems of knowledge, interest, and power on the basis of evidence about the nature of human beings and their social interaction. How does Barnett support these empirical claims? For the most part, the answer to this question is *not* through the use of social science research or history. Rather, Barnett's method is primarily to appeal to common-sense premises that are likely to be widely shared. Some readers may object to this method on the ground that it is insufficiently rigorous. There is certainly something to this objection. Before we make radical changes in social organization on the basis of Barnett's arguments, we would surely want to subject his empirical premises to the most rigorous testing, employing all of the resources of social science to the extent that they would provide useful confirmation or refutation of Barnett's views. Nonetheless, Barnett's method stands in an important tradition of social thought. Some of his armchair observations about human nature rely on the same sort of insights as did similar observations made by Thomas Hobbes and Adam Smith. Some of the empirical premises of *Structure* might be viewed as plausible hypotheses as opposed to proven conclusions. Some of Barnett's premises are, in fact, unassailable on empirical grounds. For example, it is obviously true that each of us has empirical knowledge about our own circumstances that is not shared by total strangers (p. 31); social science will have little to add concerning the truth of such premises.

C. *Knowledge, Interest, and Power*

Much of the merit of *Structure* lies in its detailed development of Barnett's central thesis — that the problems of knowledge, interest, and power require the liberal conception of justice, given the goal of providing each individual with the opportunity to pursue happiness, security, and stability. Not only does the development of the problems of knowledge, interest, and power account for the lion's share of *Structure's* text; this exposition is the heart of Barnett's argument. The success or failure of *Structure* lies in Barnett's ability to persuade readers that these are serious problems and that no form of social organization can succeed unless they are overcome.

1. *Three Problems of Knowledge*

The first cluster of problems of social interaction, Barnett calls "[t]he [p]roblems of [k]nowledge" (p. 27). There are actually three distinct problems of knowledge. The first of these (called "the first-order problem of knowledge") focuses on the relationship between individualized knowledge and effective resource use. The identification of this problem is not original with Barnett, who acknowl-

edges the work of the economist Friedrich Hayek.⁶ Each individual has personal knowledge (of her own perceptions, preferences, needs, desires, abilities, and opportunities) that is, for the most part, inaccessible to other members of society (pp. 30-31). In addition, each individual has local knowledge that is shared only by limited groups or associations (p. 34). In order for individuals to be able to use resources, they must act on the basis of their personal and local knowledge, yet take into account their ignorance of the personal and local knowledge that is in the possession of others (p. 36). This problem is relevant to one of the basic questions about desirable forms of social organization: should society be ordered on the basis of centralized authority or decentralized individual decisionmaking (pp. 45-50)? Barnett argues that jurisdiction over resources should be vested so as to permit the use of personal and local knowledge relevant to use of the particular resources. Individuals should be given rights of exclusive control over the resources they will use (p. 52). Permitting consensual transfer of jurisdiction over resources allows individuals to use their personal and local knowledge. Requiring that such transfers be consensual provides a mechanism by which each individual can take into account the personal and local knowledge of others that is relevant to the use of the resource; that mechanism is the market price (pp. 52-54). These arguments are the foundations for Barnett's first formulation of the liberal conception of justice, which includes the right of several property, the right of first possession, and the right of freedom of contract (p. 83).

The second-order problem of knowledge deals with the difficulties created by the need to make rights publicly available — that is, to make knowledge of the actions required by justice available to everyone (p. 85). Barnett recognizes that this problem of knowledge is closely connected with the ideal of the rule of law, and, in particular, with the notion that the rule of law requires that the law be public (p. 89). Barnett draws a distinctive conclusion from this requirement, one that is key to his claim that solving the problems of knowledge, interest, and power requires a minimal role for the state. The key idea is that in order for individuals to know what the law is, the set of legal rights must satisfy the requirement of compossibility. Compossibility requires that exercise of any right by a citizen be guaranteed not to interfere with the exercise of any right by any other citizen. This entails the conclusion that rights cannot contradict or be in tension with one another (pp. 90-92). Putting it another way, each individual must have a sphere of liberty that does not invade the sphere of any other individual. This move is impor-

6. Pp. 29-30. See FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, in *INDIVIDUAL AND ECONOMIC ORDER* 77 (1948).

tant, because it justifies the limitation of the liberal conception of justice to negative rights, such as rights of property and contract. The corollary of this limitation is that positive rights, such as a right to welfare, are excluded. Positive rights can collide with negative rights and hence can violate the requirement of compossibility.

The second-order problem of knowledge constrains the substantive content of the law in another way. It is possible to distinguish between legal rules on the basis of their ability to provide certain guidance in concrete cases. Barnett demonstrates this point with one of many illustrative stories involving a fictional pair, Ann and Ben. Imagine, for example, that the law provides the following rule for the acquisition of land: "The one who needs the land the most gets it." Does this rule communicate a determinate standard for conduct that could guide the actions of Ben and Ann?

Assume that both Ann and Ben are well aware of this precept in advance of any dispute between them. Ben comes across the clearing. Can he know that he needs it more than Ann? When Ann returns, how can she know whether to vacate or remain? The substance of this precept gives rise to a second-order problem of knowledge concerning what justice requires. [p. 100]

A rule that grants the first possessor jurisdiction over the land might be underdeterminate in particular cases but it would not be inherently uncertain in the same way that the greater-need-for-the-land rule must be (p. 100).

The third-order problem of knowledge concerns the need to specify concrete and particular conventions of justice that can guide action (p. 108). This problem arises in part because a theory of justice underdetermines the content of action-guiding rules. For example, the abstract formulations of the rights to private property and freedom of contract that Barnett specifies in his liberal conception of justice are insufficiently concrete to decide particular disputes. In order to overcome this part of the problem, some process for specifying the content of the rules must be instituted. This process of specification requires knowledge of the complexities of human interaction (pp. 113-14). Barnett claims that an evolutionary process of common-law adjudication is the preferred solution to the third-order problem of knowledge (pp. 114-30).

2. *The Problems of Interest*

Independent of problems of knowledge are problems of interest. Barnett identifies three of these. The first is the problem of partiality. If each individual is to pursue happiness, then social interaction must be structured so as to allow individuals to pursue their own interests. Yet partiality to one's own interests may interfere with the pursuit by others of their interests (pp. 135-38). Barnett claims that decentralized jurisdiction over resources in the

form of property rights and freedom of contract solves the problem of partiality. A regime of property and contract allows individuals to pursue their own projects and interests. Moreover, property rights and the requirement that transfer be consensual insure that each must take the interests of the other into account before using resources over which the other has jurisdiction (pp. 139-41). Barnett illustrates these abstract points with another fable of Ann and Ben:

If Ben wants to build a home on a corner of the land that Ann has cultivated for crops, then he must offer Ann something she would prefer to that which he is asking her to give up. In this way, Ann's partial interests are incorporated into Ben's cost of choice. When pursuing his personal projects, Ann's rights of several property and freedom from contract require Ben to act "impartially" with respect to Ann's interest whether he wants to or not. [p. 140]

The problem of partiality illustrates one of the central features of the argumentative structure of *Structure*. Barnett claims that the problems of knowledge, interest, and power provide independent justifications for the liberal conception of justice. Even if there were no problem of knowledge, and Ben had independent knowledge of Ann's interests in her land, Ben's partiality to his own interests creates the risk that he would act without taking Ann's interests into account. And even if Ben were perfectly impartial, he could not take Ann's interests into account given that there is a problem of knowledge.

The second problem of interest is the incentive problem. Barnett's discussion of this problem begins with the "subjective 'cost of choice,'" ⁷ i.e., the costs borne by anyone who makes a choice involving the use of resources. Because of a problem of knowledge, only the individual who makes the choice is fully aware of the nature and extent of such costs (pp. 150-53). Because of such costs, individuals normally require incentives to discover and use information about the effective use of resources. Barnett argues that a right of first possession, a right of private property, and freedom of contract provide a guarantee that individuals who incur such costs will not have the benefits taken away from them by others. Thus, the liberal conception of justice provides incentives for the efficient use of resources (p. 155). In addition, the incentive problem justifies the addition of another right to the liberal conception, a right of restitution: "[O]ne who violates the rights that define justice must compensate the victim of the rights violation for the harm caused by the injustice" (p. 159).

7. P. 150. Barnett borrows this notion from James Buchanan. See JAMES M. BUCHANAN, *COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY* 42-43 (1969).

Barnett's discussion of the incentive problem is also the occasion for a provocative discussion of public goods and free rider problems. The conventional economic wisdom about public goods is that nonexcludable goods like clean air or national defense cannot be provided by markets because of free-rider problems. Who would sign up for a voluntary national defense subscription? Barnett's challenge to this conventional wisdom consists of a number of burden-shifting strategies. Primary among these is a move that is repeated frequently in *Structure*: Barnett challenges the advocates of state-provided public goods to show that the state can actually deliver the goods, given the problems of knowledge, interest, and power (p. 162). Another burden-shifting move is to suggest that the assumption that markets cannot provide particular goods may result from a failure of imagination. Here Barnett invokes the famous example of lighthouses, often assumed to be public goods by armchair economists (pp. 163-64), but shown by Ronald Coase to be frequently supported by fees charged by nearby ports.⁸ These burden-shifting strategies are surely thought provoking, but they hardly carry the day for the radical hypothesis (perhaps implicit in *Structure*, but never explicitly advanced by Barnett) that there are no public goods, the provision of which by a state would actually advance the common interest in happiness, peace, and prosperity.

The third problem of interest is the compliance problem. The liberal conception of justice requires those who violate the rights of others to provide restitution for the harm done. But in the absence of an enforcement mechanism, rights violators will lack an incentive to provide such restitution. Barnett argues that this problem justifies a right to collect such compensation by force (pp. 174-81) and a right of self-defense (pp. 185-91). This section of the book provides an apt example of Barnett's ability to combine the discussion of concrete policy with abstract political theory. In a world where many rights violators are sure to be impecunious, the question arises as to how compensation is to be collected. Barnett's solution is to restructure the public system of prisons into privately owned engines of entrepreneurship, with prisoners engaging in market transactions both within and without the penal system (pp. 176-81). Particularly intriguing is his discussion of Maine's inmate craft program, with some inmates supposedly earning as much as \$100,000 per year (p. 180).

8. See R.H. Coase, *The Lighthouse in Economics*, 17 J. LAW & ECON. 357, 360-62 (1974).

3. *The Problems of Power*

The third and final set of problems of social interaction consists of problems of power. Although Barnett claims that the problems of knowledge and interest are independent of one another, the problem of power is derivative of the problem of interest in the following sense: because the compliance problem justifies the use of force, the problem of power arises in connection with such uses of force. Absent problems of interest, the problem of power would not necessarily arise. There are two distinct problems of power, the problem of enforcement (and nonenforcement) error and the problem of enforcement abuse.

The problem of enforcement error arises because no system of enforcement will be error-free. Some individuals who have not violated rights will be forced to pay compensation, and some individuals whose rights have been violated will not receive compensation. A similar problem arises with respect to erroneous use of self-defense. Thus, the question arises as to how to minimize the severity and frequency of enforcement error (pp. 198-99). Barnett's proposal for reducing the severity of enforcement error is both simple and controversial. Barnett argues for a principle of strict proportionality, "that the amount of the sanction be limited to what is necessary to fully compensate without overcompensating the victim" (p. 204).

Barnett then argues against the deterrence theory of punishment on a number of grounds. One of these is notable because it represents a departure from the general argumentative strategy of *Structure*. Barnett argues that imposing severe sanctions in order to increase the deterrent effect of punishment is open to moral criticism on the grounds that such punishments will inevitably also be visited on innocent persons because of the problem of enforcement error (p. 228). The moral intuition to which Barnett appeals is surely plausible, but it would seem to rely on some prior notion of a moral right that is independent of the concern for happiness, peace, and prosperity. Barnett also argues that increasing the severity of punishment may not translate into actual deterrence for a variety of reasons. Among these are that criminals may simply become more effective at evading punishment, or they may have such a high discount rate for future costs that severity will have little effect on their choices (p. 230).

The problem of enforcement abuse is actually a more specific form of the problem of partiality. Given that those with the power to impose punishments will be partial to their own interests, the power to punish or to use force to compel restitution is likely to be abused. Barnett argues that the problem of enforcement abuse is not resolved by what he calls the single power principle, the notion

that there must exist a single institution with a monopoly on the coercive use of force for each geographical territory (pp. 240-50). If power is structured in a simple hierarchy, there is no guarantee that those at the top will not themselves abuse power (p. 244). Nor do institutional constraints provide a guarantee against such abuses. For example, Barnett argues that divided government with a scheme of checks and balances is not a sufficient safeguard: "Eventually, entrepreneurs of power — master politicians, judges, executives, or outsiders called 'special interest groups' — figure out ways to teach those who share the monopoly that each has an interest in cooperating with the others in using force against those who are outside the monopoly" (p. 254). Similar arguments are advanced against the contentions that democratic elections (pp. 251-52) or a right of exit (pp. 254-55) can guard against enforcement abuse.

D. *A Polycentric Constitutional Order*

With the discussion of the problem of enforcement abuse, *Structure* negotiates a crucial turn. The argument up to this point justifies a strong set of rights, but does not address the question of institutional structure. Barnett's discussion of the problem of enforcement abuse sets up the most radical and controversial chapters of *Structure* entitled "Constitutional Constraints on Power" and "Imagining a Polycentric Constitutional Order: A Short Fable." In these chapters, Barnett moves beyond the strong classical liberalism or modest libertarianism that characterize the bulk of *Structure* and offers suggestions that are radically libertarian and even anarchist in nature.

The key idea here is that of a polycentric constitutional order — a regime in which "multiple legal systems exercise the judicial function and multiple law-enforcement agencies exercise the executive function" (p. 258). No state acts to coordinate these private entities or resolve disputes between them. All power is private power, regulated by contractual agreements between individuals and judicial or law-enforcement enterprises. Even readers who are still on the boat when *Structure* reaches these uncharted waters may wish to disembark at this point. One difficulty that is likely to occur to many readers is parallel to Hobbes's argument in *Leviathan* for his version of the single power principle. Wouldn't jurisdictional conflicts between the various executive and judicial agencies degenerate into the war of all against all in which there are "no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short"?⁹ Barnett recognizes this problem and appeals

9. THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., 1991).

to a variety of real-world examples of voluntary cooperation between competing legal systems for dealing with jurisdictional conflicts, including rules governing choice of law and personal jurisdiction (p. 277). But merely pointing to such phenomena is not sufficient to make out Barnett's argument, because these mechanisms work in the context of a legal order that subscribes to the single power principle.

Barnett does advance an argument against the likelihood that Hobbesian problems would emerge from a polycentric constitutional order. The crucial passage is worth quoting at length:

Extended conflicts between different court systems in a polycentric constitutional order are also quite unlikely. It is simply not in the interest of repeat players (and most of their clients) to attempt to obtain short-run gains at the cost of long-run conflict. . . . [W]here they have the opportunity to cooperate, participants in even the most intense conflicts — warfare, for example — tend to evolve a “live and let live” philosophy. [p. 276]

These remarks are suggestive, but hardly dispositive of the Hobbesian objection. The eminent Hobbes scholar Sharon Lloyd summarizes one interpretation of Hobbes's argument as follows:

The state of nature is a state of war because scarcity of resources relative to demand leads to competition; competition, to fear of invasion (compounded by fear of invasion, not by the needy but by prideful people in pursuit of glory); fear of invasion, to preemptive aggression; and fear of preemptive aggression, to further preemptive aggression. Given this state of affairs, it is rational for people to make preemptive attacks on their fellows.¹⁰

Of course, neither Barnett's optimism nor Hobbes's pessimism may accurately predict the fate of a polycentric constitutional order. Surely, however, more is required than Barnett has offered for society to feel confident enough to make the leap to the utopian world where the state has been replaced by private courts and law enforcement agencies.

E. Responses to Objections

The final chapter of *Structure* offers replies to a number of objections. These replies are brief and suggestive in nature, and they are not likely to satisfy Barnett's critics. The sort of strategy pursued in the replies is illustrated by Barnett's consideration of two questions that are likely to be raised about *Structure*. Why are the problems of knowledge, interest, and power the only problems addressed by the liberal conception of justice? Why not the problem of inequality, or the problem of need, or some other problem? Barnett's strategy here is not to take these problems head on, but

10. S.A. LLOYD, IDEALS AS INTERESTS IN HOBBS'S LEVIATHAN 9-10 (1992).

instead to use the central argument of *Structure* to shift the burden of going forward back to those who raise the questions:

One ought not to infringe upon the rights and procedures that make a well-ordered social life possible to address other pressing problems if doing so will seriously undermine our ability to address the problems of knowledge, interest, and power. Addressing these problems is a prerequisite to any hope we have of effectively handling the other problems of social life. A society that failed to deal effectively with the problems of knowledge, interest, and power would be in chaos. And a society in chaos cannot deal effectively with any social problem, however serious it may be. [p. 326]

Stated in this fashion, Barnett's move may leave his critics substantial room for maneuver. Grant to Barnett the premise that the problems of knowledge, interest, and power must be addressed to some degree to avoid social chaos. Further grant that social chaos would preclude the resolution of other social problems such as need or inequality. It may not be difficult for Barnett's critics to show that a society that does not fully respect the rights contained in the liberal conception of justice can nonetheless solve the problems of knowledge, interest, and power to a degree sufficient to avoid chaos. Presumably, modern social welfare states address problems of inequality through taxation and redistribution schemes without falling into complete social disorder.

Barnett makes another burden-shifting reply to critics who may raise problems other than those of knowledge, interest, and power. He suggests that the burden is on those who advocate state action to solve such problems to show that the particular problem they pose cannot be solved within the constraints of the liberal conception of justice. For example, the problem of need might be solved by charity; Barnett suggests that history supports this conclusion, although he provides rather scanty backing for this claim (p. 326). Conducted at this level, the debate between Barnett and his opponents is not likely to be settled. Resolution of this sort of empirical disagreement is sure to be difficult. Barnett and many of his critics advocate utopian social structures that, because they do not actually exist, do not yield empirical evidence to resolve disputes about their relative efficacy in addressing either the problem of need or Barnett's problems of knowledge, interest, and power.

The final chapter of *Structure* also takes up an objection that is related to the problems of need and inequality, the objection that Barnett's liberal conception of justice is inadequate because it fails to take into account the problem of distributive justice. This objection and Barnett's reply to it can serve as a vehicle for situating the project of *Structure* in the context of contemporary political philosophy.

Barnett begins his analysis of this objection by posing a series of questions about the alternative theories that advocate forced takings to achieve distributive justice (p. 309). Some of these questions raise the issues debated among theorists of distributive justice under the rubric of the "equality of what" debate. Does distributive justice require equality of welfare, equality of opportunity for welfare, equality of resources, satisfaction of Rawls's difference principle,¹¹ or something else? As Barnett acknowledges, however, the lack of consensus about what distributive justice requires does not excuse him from answering particular theories of distributive justice on their merits (p. 310). Moreover, at least some accounts of distributive justice are sufficiently developed (those of Dworkin¹² and Rawls, for example) so that Barnett could address them on their merits if he chose to do so. Barnett adopts a different strategy, pleading that because there are so many different theories of distributive justice, it is appropriate for him to "focus [on] some of the challenges posed for *any* theory of distributive justice by the problems of knowledge, interest, and power" (pp. 310-11).

Barnett's most persuasive answer to the distributive-justice objection is a variation of the burden-shifting strategy employed elsewhere in *Structure*. Barnett challenges these theorists to show how their theories can solve the problems of knowledge, interest, and power. For example, Barnett makes the following argument about the problem of knowledge:

Let's assume we settle on a particular conception of distributive justice. We are now faced with the task of determining who will have their resources taken away and who will be the beneficiary of the taking. Whatever the conception of distributive justice one adopts, the circumstances of every person in the community, or state, or nation, or world will have to be examined to see if they meet the posited standard. Does each person have "enough" of the primary goods? Which person has a surplus that may be taken from her to give to another[?] [p. 311]

But is this really a problem posed for any theory of distributive justice? Because Barnett mentions "primary goods," a feature unique to Rawls's theory,¹³ we can assume that Barnett believes that this objection does at least apply to that theory.

A close examination of Rawls's theory reveals that Barnett's questions are premised on fundamental misunderstandings of the

11. See RAWLS, *supra* note 5, at 76-78.

12. See Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 315 (1981); Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987).

13. See RAWLS, *supra* note 5, at 62.

nature of the theory. A brief explication is required to show why this is so. One relevant feature of Rawls's theory is the difference principle, which is stated in final form as follows:

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.¹⁴

This principle does not actually apply to all of the "primary goods" as Barnett's question implies. Among the primary goods are the basic liberties,¹⁵ including the right to ownership of private property.¹⁶ A preliminary point is that Rawls and Barnett are actually in agreement on the principle of distribution that applies to the basic liberties (although they disagree about the list of liberties to be incorporated in a conception of justice). Rawls's first principle of justice is that "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."¹⁷ Similarly, Barnett holds that the rights incorporated in his liberal conception of justice should be equal in their distribution. When it comes to the basic liberties, Barnett's questions — "Does each person have 'enough' of the primary goods?" "Which person has a surplus that may be taken from her to give to another?" (p. 311) — are simply misplaced.

With this technical point about the primary goods out of the way, the substance of Barnett's objection can be considered. In addition to the basic liberties, the primary goods also include income and wealth.¹⁸ Presumably, Barnett's questions are directed at the distribution of these primary goods. Once again, however, the questions are based on a misunderstanding of Rawls's theory. The two principles of justice do not apply to individuals directly; instead, they apply to the basic structure.¹⁹ The question for Rawls is whether the institutions that comprise the basic structure of society satisfy the difference principle. The question is not whether the least advantaged individual in society is benefited by any given inequality in wealth and income. Indeed, Rawls recognizes the very problems of knowledge that Barnett raises and relies on them as part of the justification for limiting the application of the two principles of justice to the basic structure of society:

14. *Id.* at 302.

15. *See id.* at 62.

16. *See id.* at 61.

17. *Id.* at 302.

18. *See id.* at 61.

19. *See id.* at 7.

[T]here are no feasible and practicable rules that it is sensible to impose on individuals that can prevent the erosion of background justice. This is because the rules governing agreements and individual transactions cannot be too complex, or require too much information to be correctly applied Thus any sensible scheme of rules will not exceed the capacity of individuals to grasp and follow them with sufficient ease, nor will it burden citizens with requirements of knowledge and foresight that they cannot normally meet.²⁰

The point is that Rawls has structured his theory in order to take the problem of knowledge into account. To advance the debate beyond this point, Barnett will need to move beyond the formulation of generic objections to theories of distributive justice in the abstract and engage with particular theories, including their responses to the problems of knowledge.

Despite this weakness in Barnett's treatment of the topic of distributive justice, there is considerable merit in his approach. Indeed, Barnett's elaboration of the problem of knowledge sheds light on Rawls's discussion of that problem. Moreover, my discussion of Barnett's replies to the distributive justice objection has been highly selective. He raises a number of other questions and objections that may fare better when they are considered in juxtaposition with particular theories of distributive justice. To clarify, I should add that I am not offering a critique of Barnett's theory from the perspective of Rawls's theory of distributive justice. Rather, the point of this discussion is to show that Barnett's attempt to shift the burden back to distributive justice critics cannot succeed without Barnett's engaging particular theories in depth.

With this brief examination of the final chapter of *Structure*, my summary of the structure of Barnett's book is complete. I now return to the topic that begins the book, the theoretical framework that forms the foundation of *Structure*.

II. THE MORAL FOUNDATIONS OF *THE STRUCTURE OF LIBERTY*

A. *The Foundational Strategy*

Barnett claims that the argument of *Structure* is properly located in the natural rights tradition (p. 17-25). His interpretation of that tradition is based on the notion that natural rights are hypothetical imperatives. Given the problems of knowledge, interest, and power, if the goal is to enable persons to survive and pursue happiness, peace, and prosperity with others, then the rights specified by the liberal conception of justice should be respected. Barnett's argument is that given certain ends, the means are natural in the same sense that the principles used by engineers to build a bridge are

20. JOHN RAWLS, *POLITICAL LIBERALISM* 267-68 (1993).

natural. Just as a bridge will fall down if the laws governing the structural soundness of bridge construction are not obeyed, so a human society will fall down if the rights contained in the liberal conception of justice are ignored (p. 4-7).

This account certainly sounds sensible, but it is also ambiguous. Initially, we might ask about the goals of happiness, peace, and prosperity. What is the content of these ends and why are they choice-worthy? Moreover, the relation between happiness, peace, and prosperity and individual persons is not formulated precisely. Is the goal for each and every person to be happy? To maximize the total amount of happiness summed across all persons? To provide each and every person the opportunity to be happy? Or is it something else? These questions are not clearly answered in *Structure*, and one might even suspect that they are studiously avoided.

More generally, *Structure* is ambiguous with respect to one of the central questions of contemporary political philosophy: should justification proceed on the basis of deep foundations in moral philosophy or theology, or should political justification limit itself to the shallow resources of public reason? As we shall see, this question is crucial to the argument of *Structure*. I will proceed by examining the implications of each interpretation in turn.

Before I begin the task of clarifying the foundations of *Structure*, I should note that Barnett himself believes such foundational work is not essential to his enterprise. After discussing whether his approach is consequentialist or deontological, Barnett concludes: "Perhaps all this suggests that how we describe or categorize the analysis I will present here is less important than the merits of the analysis itself" (p. 24). But this assumes that the work of clarification is merely a matter of applying labels. If that were the case, then Barnett would surely be correct to set the problem aside as a merely academic exercise. If, on the other hand, questions about foundations must be answered in order to determine what Barnett's analysis *is* and therefore what its merits *are*, then the proper answer to foundational inquiries is not a plea of confession and avoidance.

B. *Does Structure Rest on Deep Moral Foundations?*

One possible interpretation of *Structure* is that its arguments rest on deep moral foundations. On this interpretation, *Structure* posits a particular set of human interests (in happiness, peace, and prosperity) and claims that these interests really are the true and universal interests of all persons. These interests are general and abstract in nature. Given Barnett's account of the problems of knowledge, the claim that these interests are universal need not en-

tail the further conclusion that there is any single plan of life that leads to happiness for all humans. There might be many plans of life that can lead to happiness, and the selection from among these might vary from individual to individual. Nonetheless, on the deep-moral-foundations interpretation of *Structure*, it would be the case that happiness, peace, and prosperity are true and universal human interests that would serve as the ultimate moral foundation upon which *The Structure of Liberty* rests.

1. *Happiness, Peace, and Prosperity*

Investigation of the deep-moral-foundations interpretation can begin with an examination of "happiness, peace, and prosperity." Barnett has very little to say about these foundational ends. Indeed, his discussion of them suggests that he does not find questions about these ends to be fruitful ones:

This natural law account of moral "principles of society" assumes, of course, that "happiness . . . peace and prosperity" are appropriate ends. While the essence or nature of happiness, peace and prosperity may properly be controversial, should anyone question the assumption that these are desirable ends to be pursued, additional arguments will need to be presented. [p. 7]

To some extent, Barnett is on safe ground when he assumes that happiness, peace, and prosperity are desirable ends. If not these ends, then which ends? Questions arise immediately, however. Initially, the three ends do not seem to be of equal moral status. Happiness is a good candidate for a noninstrumental or final end: we desire happiness for its own sake and not for the sake of anything else. Peace and prosperity, on the other hand, might plausibly be viewed as instrumental to happiness. We want peace and prosperity so that we can pursue happiness, not the other way around. If these three ends are foundational, it is clear that happiness provides the cornerstone of *Structure's* foundation.

As Barnett acknowledges, the essence or nature of happiness is controversial (p. 7). And the nature of happiness might affect the argument of *Structure*. For example, the classical Aristotelian view of happiness is that happiness requires a life of reason involving activities done well, that is, in accord with the human excellences or virtues.²¹ One implication of this view might be that an essential role of the state is the inculcation of virtue.²² Barnett addresses this argument with his now familiar strategy. He argues that the burden is on the advocates of state-enforced virtue to show that they can

21. See ARISTOTLE, *Nicomachean Ethics* bk. I, ch. 10 in 2 *The Complete Works of Aristotle* at 1100a10-1101a21 (Jonathan Barnes ed., 1984).

22. See *id.* bk. I, ch. 13, at 1102a5-15; FRED D. MILLER, JR., *Nature, Justice, and Rights in Aristotle's Politics* 13 (1995).

overcome the problems of knowledge, interest, and power (p. 306). A full account of virtue, however, might address these issues. For example, Barnett's discussion of the problem of knowledge assumes that individuals possess the knowledge necessary to make choices affecting their own happiness. A virtue-centered theory of the state might counter that such knowledge can only be possessed and effectively used by persons who already possess the virtues to a sufficient degree. Perhaps it is the case that only persons with the intellectual virtues of theoretical and practical wisdom can make use of their individual and local knowledge in a way that leads to happiness. This is not the occasion to take up Barnett's challenge — to offer a virtue-centered account of the role of the state in the promotion of virtue that takes the problems of knowledge, interest, and power into full account. Rather, the point is that an investigation of foundational questions, such as connections between virtue, knowledge, and happiness, might undermine fundamental presuppositions of Barnett's argument. If Barnett contends otherwise — for example, if he claims that the argument of *Structure* extends to any plausible notion of happiness, irrespective of the conceptual framework in which the notion is embedded — then a heavy argumentative burden goes with that contention. After preliminary skirmishing about the burden of proof, Barnett will need to get down to the difficult task of engaging particular theories of happiness on their merits.

2. *A Utilitarian Interpretation*

Laying aside questions about the nature of happiness, there remain questions with respect to the role that happiness plays in Barnett's foundational argument. One plausible interpretation of *Structure* is that its foundations are consequentialist or utilitarian. The first piece of evidence for this interpretation is negative. On the surface, at least, it appears that Barnett does not rely on any deontological premises for ultimate foundations. In this regard Barnett differs from Robert Nozick, who made self-ownership a fundamental premise in the justificatory strategy of *Anarchy, State, and Utopia*.²³ Rather, his strategy is similar to that employed by John Stuart Mill in *On Liberty*.²⁴ Like Mill, Barnett seems to forgo

23. Nozick begins *ANARCHY, STATE, AND UTOPIA* as follows: "Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do." ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974).

24. See John Stuart Mill, *On Liberty*, in *UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 74 (H.B. Acton ed., 1972) ("It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions . . .").

any advantage that could be derived by assuming self-ownership, autonomy, or rights of personhood.

The second piece of evidence for the consequentialist interpretation of *Structure* is the reliance on happiness, peace, and prosperity as the normative predicates in Barnett's hypothetical imperative. Barnett introduces these ends by quoting a sermon delivered by Elizur Goodrich to the Governor and General Assembly of Connecticut on the eve of the Constitutional Convention: "No more can mankind be conducted to happiness; or civil societies united, and enjoy peace and prosperity, without observing the moral principles and connections, which the same Almighty Creator has established for the government of the moral world."²⁵ More particularly, *Structure* takes as a given "the goal of enabling persons to survive and pursue happiness, peace, and prosperity while living in society with others" (p. 23). Because Barnett has so little to say about this goal, it is not clear whether the goal is to maximize happiness, peace, and prosperity, to provide each person with a sufficient amount of these goods, or something else. A maximizing interpretation is not wholly implausible, however, and the notion that happiness should be maximized is a straightforward version of eudaimonistic utilitarianism.²⁶

A third piece of evidence is Barnett's use of consequentialist reasoning in his explication of the first problem of interest, in other words, the problem of partiality. Recall that Barnett argued that the problem of partiality justified the rights of several property and freedom from contract. Why was this so? The example of Ann and Ben, quoted above, provided the reason: "When pursuing his personal projects, Ann's rights of several property and freedom from contract require Ben to act 'impartially' with respect to Ann's interest whether he wants to or not" (p. 140). But why is "impartiality" required? The consequentialist interpretation of Barnett provides a natural explanation: utilitarians sum interests (utility) across persons. Ben should be impartial with respect to Ann's interests because the right outcome is the outcome that maximizes the sum of Ann and Ben's utility. Impartiality across the interests of persons is a quintessentially utilitarian idea.²⁷

25. Elizur Goodrich, *The Principles of Civil Union and Happiness Considered and Recommended*, in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730-1805*, at 915 (Ellis Sandoz ed., 1991) (quoted at p. 1).

26. Eudaimonistic utilitarianism takes as its maximand happiness, as opposed to preference-satisfaction utilitarianism (maximizing preference-satisfaction), hedonistic utilitarianism (maximizing the balance of pleasures over pains), or welfare utilitarianism (maximizing interests). See generally *Eudaimonism*, *The Cambridge Dictionary of Philosophy* 251 (Robert Audi ed. 1995); ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 13 (1995).

27. See Robert E. Goodin, *Utility and the Good in A COMPANION TO ETHICS* 20 (Peter Singer ed. 1993).

The fourth and most salient piece of evidence is Barnett's explicit discussion of the question as to whether his theory is utilitarian. It is interesting that Barnett does not take an unequivocal stand, even though he recognizes the question. The crucial passage is worth quoting at length:

Is a natural rights analysis *utilitarian*? Though this type of philosophical question is really beyond the scope of this book, for what it is worth, my answer depends on how the term "utilitarian" is used. If utilitarian is viewed as a *consequentialist* approach that evaluates practices by their consequences, then the conception of natural rights sketched here appears to be consequentialist, though only indirectly.

....

If utilitarianism is viewed as a general *theory of ethics* or morality, however, then the natural rights approach presented here, though consequentialist, is not utilitarian. The approach presented here does not provide a theory of how persons ought to pursue the good life, the traditional province of ethics. [p. 23]

Barnett is simply declaring himself in these passages; he is not providing an argument for (or even an explanation of) his position.

What are we to make of these remarks? One clue to Barnett's position is that his position "evaluates practices by their consequences" and that it is "consequentialist, though only indirectly" (p. 23). Here we need to be cautious. When Barnett refers to the evaluation of *practices* as opposed to *acts* by their consequences, he is likely referring to a distinction akin to that between act and rule utilitarianism. When he refers to *indirect* as opposed to *direct* consequentialism, he might be referring to the act/rule distinction or he might be referring to the difference between *direct* consequentialism as a practical standard for decisionmaking and *indirect* consequentialism as a theory for the evaluation of practical standards for decisionmaking. If Barnett intends the latter meaning by his reference to indirect utilitarianism, then his discussion may conflate two different distinctions that are made in utilitarian theory. All of this requires further explication to make Barnett's position clear.

Begin with the distinction between act and rule utilitarianism. Act utilitarianism takes the individual action as the morally relevant unit. Thus, "act so that your action produces the best consequences of all the available actions" is an act utilitarian principle. For example, if in a particular case, breaking your promise produces greater utility than keeping it, then act utilitarianism requires you to break your promise. Rule utilitarianism takes general rules as the morally relevant unit. Thus, "act so that your action is in conformity with the set of moral rules that maximizes utility as compared to other possible rule sets" is a rule utilitarian principle. Even if promise breaking would maximize utility on this particular occasion, rule utilitarianism might require you to keep your prom-

ise if the utility-maximizing set of moral rules required that promises be kept. Barnett states that his approach evaluates the utility of "practices" (p. 23), suggesting that he is not an act utilitarian but a "practice" utilitarian.

What does Barnett mean by "practice"? Initially, he does not mean moral rules, such as "keep your promises" or "do not lie." This is clear from his statement that he does not have a comprehensive moral theory, "a theory of how persons ought to pursue the good life" (p. 23). By "practice," he evidently means to refer only to practices that lie within the sphere of social ordering or law. Moreover, Barnett's approach does not seem to allow for the evaluation of individual legal rules (such as particular statutes) by assessing their utility. Barnett makes this clear when he says that if utilitarianism is "*a method of decision making* in which the effects of various policies are assessed by determining their effects" (p. 24) then his view is not utilitarian. Rather, it appears that the relevant unit is the conception of justice.²⁸ We assess conceptions of justice by considering their impact on happiness, peace, and prosperity, and then we assess individual legal rules (statutes, common law rules, etc.) by their conformity to the conception of justice.

Why should we limit our utility assessment to conceptions of justice and avoid the assessment of individual legal rules or even individual actions? Several explanations might be available to Barnett. One possibility is that Barnett believes conception-of-justice utilitarianism to be extensionally equivalent²⁹ to legal-rule utilitarianism and/or act utilitarianism; in other words, the choice of unit for utility assessment makes no difference in practice. This explanation, however, seems inconsistent with Barnett's insistence that his theory does not assess the utilities of individual legal rules or policies (p. 24).

Another possibility is that Barnett believes that conception-of-justice utilitarianism is preferable to legal-rule utilitarianism or act utilitarianism because of problems of knowledge, interest, or power. For example, Barnett may believe that if individuals attempt to act in conformity with act utilitarianism, they will fail because they lack sufficient knowledge to assess the utility of their actions. It is not clear, however, that a similar argument can be

28. The text should be qualified in the following respect. The utility of individual legal rules could be a proper step in the assessment of conceptions of justice. Thus, one might proceed as follows. One takes a conception of justice. One then evaluates the various legal rules that would follow from the conception of justice for utility. This procedure is iterated until the various conceptions of justice have been evaluated. The conception with the highest utility score is then selected. That conception is then used to evaluate individual legal rules. Individual legal rule utility would play its role only at the state of selecting the best conception of justice.

29. See DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* x (1965).

made to justify the selection of conception-of-justice utilitarianism over legal-rule utilitarianism. This is because the problem of knowledge is likely to be more acute for conceptions of justice than it is for individual legal rules. Utility assessments require knowledge of consequences, and consequences are relatively easier to predict for individual legal rules than they are to predict for entire conceptions of justice. Conceptions of justice impact many legal rules and may be consistent with several different alternative sets of legal rules. For this reason, scoring the utility of entire conceptions of justice is likely to pose greater problems of knowledge than scoring the utility of individual legal rules.

Another possibility is that Barnett would appeal here to problems of interest to justify conception-of-justice utilitarianism. Perhaps legal rulemakers are likely to be partial in their selection of legal rules if they use utility as a standard because the utility of individual legal rules may appear ambiguous or uncertain and hence provide insufficient guidance. If, on the other hand, legal rule makers act in accord with the liberal conception of justice, they may be able to avoid the problem of partiality, precisely because the liberal conception forbids the selection of partial rules by guaranteeing rights of several property, freedom of contract, and so forth. These possibilities are not discussed in *Structure*. What is clear is that Barnett himself provides no justification for conception-of-justice utilitarianism, and that such a justification is required if such a utilitarian theory is to provide deep foundations for *The Structure of Liberty*.

These matters are further complicated by the distinction between direct and indirect consequentialism. The direct/indirect distinction could be used synonymously with the distinction between act and rule utilitarianism.³⁰ But this distinction is also used to reflect a related but different distinction, that between principles "for use in practical moral thinking"³¹ and decisions that "would be arrived at by leisured moral thought in completely adequate knowledge of the facts, as the right answer in a specific case."³² If Barnett's approach were indirect in this sense, this would mean that the foundational moral theory is act utilitarianism. Act utilitarianism would be the theory that would be used to evaluate the individual actions made as a result of legal rules from the point of view of leisured moral thought unconstrained by problems

30. Act utilitarianism would be said to be direct, because individual actions are evaluated directly for their utility. Rule utilitarianism would be said to be indirect, because acts are evaluated for utility indirectly via the system of rules.

31. R.M. Hare, *Ethical Theory and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 31 (Amartya Sen & Bernard Williams eds., 1982).

32. Amartya Sen & Bernard Williams, *Introduction* to *UTILITARIANISM AND BEYOND*, 1, 15 (Amartya Sen & Bernard Williams eds., 1982).

of knowledge and interest. The liberal conception of justice would provide principles for use in practical moral thinking at the level of legal rule formulation, and the legal rules would provide practical principles for use by individual agents when making decisions concerning the use of resources in social interactions.³³ If this interpretation is correct, then Barnett was in error when he stated that his approach is utilitarian in the sense that it "evaluates practices by their consequences" (p. 23).

The text of *Structure* is not sufficiently explicit on this issue to permit a confident judgment as to whether Barnett intends his theory to be indirect in this sense. One consideration favoring this interpretation of *Structure* is that indirect utilitarianism has been justified on grounds that are very similar to what Barnett calls the problems of knowledge and interest. Thus, R.M. Hare, the philosopher most strongly associated with indirect utilitarianism, explained that the direct application of act utilitarian principles is "appropriate only to 'a cool hour', in which there is time for unlimited investigation of the facts, and there is no temptation to special pleading."³⁴ Given the central role that the problems of knowledge and interest play in *Structure*, it would seem that Hare's indirect utilitarianism is at least consistent with many of Barnett's central ideas.

The choice between the two interpretations of Barnett's remarks on utilitarianism is not merely an academic exercise. It has profound implications for the status of the liberal conception of justice. Conception-of-justice utilitarianism holds that actions or legal rules violating the liberal conception of justice violate a moral duty if they violate the conception that maximizes utility. If this is Barnett's position, then the constraints of the liberal conception are strong constraints. They cannot be overridden by showing that a particular action or legal rule would maximize utility even though it violates the conception.

Indirect utilitarianism does not entail that the liberal conception of justice creates strong constraints. If the liberal conception is supported by indirect utilitarianism, then it provides the standard for ordinary, practical moral deliberation. But its conclusions could be overridden if cool reflection with adequate knowledge and assessment of possible problems of partiality reveals that a particular legal rule would maximize utility, even if that rule violates the liberal conception. Since legal rule formulation frequently does take place under conditions of cool reflection, it would seem plausible

33. But there might be other moral principles that would address other questions, such as whether one should keep one's noncontractual promises, whether to give to charity, and so forth.

34. Hare, *supra* note 30, at 31.

that this possibility would be more than merely theoretical. The distinction between conception-of-justice utilitarianism and indirect act utilitarianism correlates with the difference between a liberal conception of justice as the ultimate standard of political morality and the liberal conception of justice as a practical guideline for political and legal choice.

3. *A Deontological Interpretation*

So far, I have considered the possibility that *Structure* rests on deep foundations in utilitarian moral theory, but there are passages that suggest something quite different. Despite the emphasis in *Structure* on happiness, peace, and prosperity as goals, there are other passages that suggest a deontological moral theory as the deep foundation for the liberal conception of justice. The most striking passage occurs near the close of Barnett's discussion of the question of whether his views are utilitarian: "[R]especting natural rights, not the calculation and aggregation of subjective preferences, promotes the common good. And the common good is viewed, not as a sum of preference satisfaction, but as *the ability of each person to pursue happiness, peace, and prosperity while acting in close proximity to others*" (p. 24; emphasis added).

This passage is problematic for a number of reasons. Initially, there is the use of the phrase "common good,"³⁵ which suggests that a consequentialist or teleological reason is being offered. Common good, however, is defined in a way that might belie this suggestion. The definition of common good is "the ability of each person to pursue happiness, peace, and prosperity while acting in close proximity to others" (p. 24). One interpretation of this phrase is that the justification for the liberal conception of justice rests on a moral right of each person to a set of legal rights governing social interactions that create an equal opportunity for the pursuit of happiness. It is apparent that the interpretation I have just offered differs in several respects from Barnett's own formulation. In order to make this transformation plausible, a number of issues should be considered.

Initially, there is a minor difficulty with the qualifying phrase "in close proximity to others" that concludes the definition of the common good (p. 24). It seems unlikely that Barnett intends this phrase to be taken in its literal sense. Surely physical proximity is not relevant here. There is no good reason to believe that the liberal conception of justice would apply to humans who live in dense urban environments like New York City but would not apply to Navaho people who choose to live in geographically dispersed locales.

35. So far as I can tell, the phrase "common good" occurs only in this passage. This is the only entry for "common good" that appears in the index of *Structure*. P. 339.

More likely, proximity is used here to signify conditions under which humans engage in significant social interaction with respect to the use of resources and the exchange of services. Another minor point concerns the inclusion of peace in the list of things that each individual should have an ability to pursue (p. 24). It seems likely that peace is one of the conditions that make the pursuit of happiness and prosperity possible. There is no good reason to believe that each individual should have the ability to pursue peace.³⁶

The next question concerns the meaning of "the *ability* of each person to pursue happiness, peace, and prosperity" (p. 24; emphasis added). What is meant by ability here? Without reference to context, one might interpret ability to mean individual capacity, but this seems implausible. Nothing in *Structure* suggests that Barnett is concerned with providing either the character traits or intellectual development that would facilitate the pursuit of happiness and prosperity. A more plausible interpretation is that ability here is being used to refer to opportunity. Thus, the notion is that each individual should have an opportunity to pursue happiness and prosperity.

Two more questions remain concerning this formulation: What quantum of opportunity should be provided and how should it be distributed across persons? Should we maximize the opportunity set without regard to the distribution of opportunities among persons? This interpretation seems implausible, both because this fails to give meaning to the qualifier "each" in "each person" and because Barnett's move to the *common* good is explicitly aimed against a maximizing approach. A plausible interpretation is that each person should have an *adequate* opportunity to pursue happiness and prosperity, equal to the opportunity provided to every other person. A variation of this would require that each person have the *maximum* opportunity to pursue happiness and prosperity, consistent with an equal opportunity for every other person. *Structure* has little to say that would permit us to choose between these two formulations.

Suppose then that the foundational principle of *Structure* is that each and every person should be given the maximum opportunity to pursue happiness and prosperity that is consistent with an equal opportunity for every other person — call this the "opportunity-for-happiness principle" for short. The liberal conception of justice would then be the set of background rights that satisfies this principle, given the problems of knowledge, interest, and power. This

36. Peace is most plausibly seen as a condition for the individual pursuit of happiness and prosperity. It does not seem plausible to posit the opportunities of individuals to pursue peace as a foundational goal. Although some individuals may have life plans that include working for peace, there is no reason that each and every individual should be provided the opportunity to pursue this particular calling as opposed to any other.

principle is most naturally viewed as rooted in a deontological approach to ethics. One example of deontological ethics is Thomas Scanlon's contractualism, which holds that an action is wrong if it would be disallowed by any principle that no one could reasonably reject.³⁷ The opportunity-for-happiness principle might plausibly be seen as one that no one could reasonably reject, although I cannot sketch the argument for that conclusion on this occasion. The deontological interpretation also finds some support in the text of *Structure*. Barnett suggests that his approach is difficult to distinguish from one in which "[r]ights are used to create a legal system which defines a set of compossible territories that provides the *necessary political condition* for the possibility that individuals might" pursue happiness and prosperity.³⁸ Barnett acknowledges that such an approach might be deontological (p. 24).

If *Structure* has deontological foundations, once again there are important implications for the content and status of the liberal conception of justice. Deontological foundations are likely to lead to the view that the liberal conception imposes strong constraints on the content of legal rules. One of the important differences between consequentialist and deontological morality concerns the question of whether good consequences can override moral rules, such as the rule of political morality provided by the liberal conception of justice. Deontological theories severely constrain or even forbid the overriding of such moral rules on the grounds that good consequences would accrue. Moreover, the content of the liberal conception of justice might change once the requirements of the underlying deontological moral foundations were laid bare. Because Barnett does not take a stand on these fundamental issues, they cannot be resolved without doing extensive reconstruction of *Structure*'s foundations.

C. Public Reasons

So far, my discussion of *Structure*'s fundamental premises has focused on the possibility that the liberal conception of justice has deep foundations in a comprehensive moral theory of the good. There are, however, cogent reasons to believe that Barnett wishes to avoid commitment to any particular comprehensive doctrine. The way that Barnett phrases his reluctance is quite odd. He suggests that he is simply not interested in the way his views would be categorized by contemporary academic moral and political philosophy. He writes, "I care less about a topology of the reasons I ad-

37. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 197 (1998); T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND, *supra* note 30, at 103.

38. P. 24 (quoting DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE 115 (1991)).

vance for a particular conception of justice and the rule of law than I do the reasons themselves" (p. 24). Surely, Barnett is right to reject classification as an end in itself, but neatness in academic labeling is not the reason one might wish to know about the foundational status of *Structure*. There are profound differences between the various moral theories that might serve a foundational role for *Structure*. I have already explored some of the ways that such differences might affect the force and content of the liberal conception of justice. In addition, there is another difference of substantial importance. Foundational theories are controversial. To the extent that the argument of *Structure* rests on normative premises derived from a comprehensive moral doctrine, that argument will be unconvincing to those who reject the premises. We therefore should consider the question of whether *Structure* needs deep moral foundations at all.

Could *The Structure of Liberty* stand instead on the shallow foundations provided by the resources of public reason? We can investigate this question by examining the account of political justification offered by Rawls in his book *Political Liberalism*.³⁹ Rawls believes that it is unrealistic to expect agreement on the deep foundations for our political convictions. Why not? Rawls's answer depends on two further ideas: *the fact of pluralism* and *the burdens of judgment*. Modern democratic societies are characterized by what Rawls calls "the fact of pluralism" — the fact that there is a "plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life."⁴⁰ In societies like ours, there are many different religious and moral views about what sort of life is best and what is the nature of the good. Moreover, the plurality of comprehensive religious and moral views is a durable feature of modern political life because of what Rawls calls "burdens of judgment."⁴¹ Disagreement (about matters such as the ultimate moral foundations of a conception of justice) is expected and reasonable given the difficulties of coming to consensus about these topics. These difficulties include: complex and conflicting evidence, disagreement about what is relevant and how to weigh the considerations that are relevant, the underdeterminacy introduced by hard cases, the fact that there may be different kinds of normative arguments on both sides of a moral question, and differences in forms of life that lead to different standards for the evaluation of evidence and argument.⁴²

39. RAWLS, *supra* note 20.

40. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987); see also Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1087-89 (1990).

41. RAWLS, *supra* note 20, at 54-58.

42. See *id.* at 56-57.

These considerations suggest an alternative explanation for Barnett's reluctance to commit to deep moral foundations. His reluctance might reflect the notion that such foundations are inappropriate for a theory of justice that is to regulate the basic structure of a pluralist society. We have already seen that Barnett does not take a clear stand about the sort of political justification that is appropriate for his theory. There are, however, elements of Barnett's approach that strongly suggest that a society ordered by the liberal conception of justice would be a pluralist society. First, the liberal conception would create the conditions for pluralism. Although Barnett's theory does not directly address freedom of thought and expression, the constraints of the liberal conception of justice would seem to require that human communication be ordered by a regime of private property and contract and not be regulated by the state. Under these conditions, we would expect there to be a variety of comprehensive moral and religious doctrines of the good. Second, Barnett's discussion of the first order problem of knowledge suggests that he believes that humans do not all share the same set of interests and values. One aspect of the first order problem of knowledge is that persons have individual knowledge of their own interests and values; such individual knowledge presumes that such interests are different for different persons. Third, Barnett is explicit that his theory is not committed to any particular conception of the good: "The approach presented here does not provide a theory of how persons ought to pursue the good life" (p. 23). For these three reasons, Barnett's views are at least compatible with the premise that a society ordered by the liberal conception of justice would be a pluralist society.

What sort of justification is appropriate for the conception of justice that is to order the basic structure of a pluralist society? Two considerations suggest that the appropriate justification should not rest on particular moral or philosophical views about the good. First, as a practical matter, justifications rooted in comprehensive doctrines are not likely to work beyond the group of existing adherents to the doctrine. Thus, if *Structure* had been rooted in a particular religious view, such as Catholicism or Islam, or if it had been grounded on a particular moral theory, such as Kant's theory or comprehensive act-utilitarianism, the argument of *Structure* would have had limited appeal. Second, as a matter of political morality, it can be argued that the legitimacy of a society regulated by a conception of justice depends in part on that conception having a justification that can be accepted as reasonable by those who will live in the society. Rawls calls this idea "the liberal principle of legitimacy." This principle holds that "our exercise of political power is proper and hence justifiable only when it is exercised in accordance

with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”⁴³ It is not reasonable to expect citizens who hold their own comprehensive views about religion and morality to endorse the conception of justice that regulates their society on the basis of a different comprehensive doctrine. For example, Baptists could not reasonably be expected to endorse utilitarianism, Buddhism, or secular humanism as the fundamental foundation for the principles that regulate the basic structure of society.

Given that it is neither practical nor fair to rest the justification for a conception of justice on controversial moral and religious views about the good life, what is the alternative? The justification for a conception of justice can be limited to the resources of public reason, the common reason of all the rational and reasonable members of a community.⁴⁴ These resources include common sense, the uncontroversial conclusions of science, and values that can be derived from the public political culture. By limiting the justification of the liberal conception of justice to public reason, Barnett would make his theory accessible to those who adhere to a wide variety of religious and moral doctrines. Rawls postulates that in these circumstances a conception of justice could become the focus of an overlapping consensus.⁴⁵ The adherents of various comprehensive doctrines would find their own deep foundations for the public values on which the conception rests.

Can *Structure* rest on foundations limited to public reason? The answer to this question is surely yes, because for the most part, it already does. The development of the problems of knowledge, interest, and power is accomplished through the use of common sense and uncontroversial premises. It is true that the factual conclusions that Barnett draws from these premises are controversial; Barnett argues that the problems of knowledge, interest, and power create strong constraints on the role of the state. This feature of *Structure* is not problematic, however, so far as the requirements of public reason are concerned. So long as novel and controversial factual conclusions are supported with the resources of public reason, these conclusions are accessible to reasonable persons who adhere to a wide variety of comprehensive doctrines.⁴⁶

Do the normative premises of *Structure* comport with the requirements of public reason? More particularly, is the “common

43. *Id.* at 217.

44. *See id.* at 212-54.

45. *See id.* at 133-72.

46. *See* Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459, 1476-77 (1996).

good . . . viewed, not as a sum of preference satisfaction, but as the ability of each person to pursue happiness, peace, and prosperity" (p. 24) a value that can be derived from the public political culture? A full answer to this question is outside the scope of this review, but a tentative inquiry suggests that there are good reasons to believe that *Structure's* definition of the common good satisfies the strictures of public reason. The goal, providing each person the opportunity to pursue happiness and prosperity, is formulated with sufficient generality and abstraction to avoid commitment to any particular moral or religious conception of the good. If we focus on the United States as a case study, similar goals are deeply rooted in our public political culture. For example, the Preamble of the United States Constitution includes "domestic Tranquility" and "the general Welfare" as aims. Moreover, it seems likely that opportunities for happiness, peace, and prosperity are values that could be affirmed by individuals who adhere to a wide variety of religious and moral views about ultimate questions of good. Even if Barnett's precise formulation of these goals might be objectionable, it seems likely that an alternative formulation could fill the needed role in the argument. Because the problems of knowledge, interest, and power are so pervasive, the core argument of *Structure* would survive if "the general welfare" or "opportunity of individuals to pursue chosen plans of life" were substituted for happiness and prosperity.

Thus, a persuasive case can be made that the best interpretation (or reformulation) of the argument of *Structure* would eschew the need for deep foundations and rely instead on a shallow foundation constructed only from the materials of public reason. This move, however, cannot be made without paying a price. For example, to the extent that the argument of *Structure* relies at any point on maximization of happiness and prosperity as the justification for *not* limiting or qualifying the rights contained in the liberal conception of justice, that feature of the argument would no longer be valid. The values that can be affirmed by the public reason of a pluralist society are necessarily less robust than those which are located within particular comprehensive doctrines. Whereas utilitarianism or Kantianism may have determinate implications for particular questions about the form or content of legal rights, public political values are likely to become relatively more underdeterminate as the question at issue becomes more concrete. The implication for *Structure* is that any robust conclusions will need to be supported by arguments that rely on the problems of knowledge, interest, and power for their cutting force.

III. THE FOURTH ORDER PROBLEM OF KNOWLEDGE

Finally, I would like to take up an issue that arose in connection with the question of whether *Structure* should be interpreted as resting on a form of rule utilitarianism.⁴⁷ The argument of *Structure* depends on knowledge of consequences. The liberal conception of justice is preferred over the alternatives, because the liberal conception fares better with respect to the problems of knowledge, interest, and power. Moreover, *Structure* claims that the role of such consequentialist arguments should be indirect rather than direct.⁴⁸ We should evaluate individual legal rules by the liberal conception of justice; consequences should be brought to bear only at the level of selecting the conception.

There is, however, a problem of knowledge associated with this method of analysis. Let us call this problem "the fourth order problem of knowledge." This problem of knowledge stems from the fact that it is relatively more difficult to assess the consequences of whole conceptions of justice than it is to assess individual legal rules. There are several reasons why this is so. Initially, the consequences of adopting whole conceptions of justice cannot be assessed directly. Problems of knowledge, interest, and power arise in concrete choice situations, and attend to individual legal rules that govern those situations. In addition, the consequences of whole conceptions of justice are global in nature. When we compare two conceptions of justice on the basis of their consequences, the task is an enormous one. Because so many individual legal rules will change, it is a daunting task to simply trace out the causal connections one by one. This problem is compounded by the difficulty of assessing the interactions between simultaneous changes in many different legal rules. Finally, the problem of assessing consequences is complicated by the fact that abstract conceptions of justice may be satisfied by several different sets of particular legal rules. Selecting the optimum set for each conception of justice is itself a difficult task.

If we accept that the fourth-order problem of knowledge is real and substantial, what are the implications for *Structure*? The most important implication concerns the status of the liberal conception of justice. Given the fourth order problem of knowledge, it seems difficult to sustain Barnett's claim that consequences should not play a role in the design of particular legal rules. Of course, there may be countervailing considerations that would caution against departure from the requirements of the liberal conception of justice on the basis of a rule-by-rule assessment of the consequences. For

47. See *supra* text accompanying notes 27-28.

48. See discussion *supra* section II.B.2.

example, problems of partiality may counsel against individualized assessment of consequences. Based on this preliminary assessment, however, the fourth order problem of knowledge would appear to be a substantial one. There does not seem to be any *a priori* reason to believe that problems of partiality would always trump the fourth order problem of knowledge.

If the fourth order problem of knowledge justifies departures from the liberal conception of justice, does this strengthen or weaken *Structure*? On the one hand, it might be argued that the power of the theory is weakened, because it would no longer provide trumping *a priori* arguments against departures from the liberal conception based on particularized assessment of consequences. On the other hand, this very weakness might actually enhance the persuasiveness of the argument as a whole, particularly to readers who are intuitively uncomfortable with the radical conclusions reached in *Structure*. Once the fourth order problem of knowledge is taken into account, those readers are free to get off the boat when they believe that a departure from the liberal conception is justified. The price of justifiable exit, however, is a persuasive argument that the problems of knowledge, interest, and power have really been taken into account. This approach leaves intact the central argument of *Structure* and creates the maximum room for both liberal and conservative foes to constructively engage its arguments. In the end, a frank acknowledgement of the fourth order problem of knowledge can strengthen the force and persuasiveness of *Structure's* core.

CONCLUSION

The Structure of Liberty makes substantial contributions to fundamental debates over the proper function of law. Perhaps the most important contribution of *Structure* is its detailed development of the problems of knowledge, interest, and power. The accessibility of the arguments for the importance of these problems opens up an opportunity for readers unfamiliar with the libertarian tradition of social thought to engage with ideas that have a power to provoke rethinking of fundamental assumptions about the proper function of law. Hardly less significant is *Structure's* wealth of creative ideas about concrete problems of social policy, especially with respect to the alternatives to our dismal practices of punishment. *The Structure of Liberty* puts a provocative set of ideas on the table for discussion. That these ideas will be taken up seems assured by the power and clarity of Professor Barnett's important book.